

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 PHYLLIS WEHLAGE, on behalf of herself
5 and on behalf of others similarly
6 situated,

No. C 10-05839 CW

ORDER GRANTING
DEFENDANTS'
REQUEST FOR LEAVE
TO FILE
ADDITIONAL
AUTHORITY,
DENYING WITHOUT
PREJUDICE EMPRES
ENTITIES' RULE
12(B)(2) MOTION
TO DISMISS,
GRANTING EMPRES
ENTITIES AND
EVERGREEN
ENTITIES' RULE
12(B)(6) MOTION
TO DISMISS, AND
GRANTING IN PART
AND DENYING IN
PART DEFENDANT
EVERGREEN AT
LAKEPORT'S MOTION
TO DISMISS
(Docket Nos. 22,
23, 25 and 45)

7 Plaintiff,

8 v.

9 EMPRES HEALTHCARE, INC.; EHC
10 MANAGEMENT, LLC; EHC FINANCIAL
SERVICES, LLC; EVERGREEN CALIFORNIA
HEALTHCARE, LLC; EVERGREEN AT ARVIN,
LLC; EVERGREEN AT BAKERSFIELD, LLC;
EVERGREEN AT LAKEPORT, LLC; EVERGREEN
AT HEARTWOOD, LLC; EVERGREEN AT
SPRINGS ROAD, LLC; EVERGREEN AT
TRACY, LLC; EVERGREEN AT OROVILLE,
LLC; EVERGREEN AT PETALUMA, LLC; and
EVERGREEN AT GRIDLEY (SNF), LLC,

11 Defendants.

12 /

13
14 Plaintiff Phyllis Wehlage brings claims against Defendants
15 EmpRes Healthcare, Inc., et al., under California law for their
16 alleged failure to provide sufficient staffing at skilled nursing
17 facilities (SNFs). Defendants EmpRes Healthcare, Inc.; EHC
18 Management, LLC; EHC Financial Services, LLC; and Evergreen
19 California Healthcare, LLC (collectively, EmpRes Entities) and
20 Defendants Evergreen at Arvin, LLC; Evergreen at Bakersfield, LLC;
21 Evergreen at Heartwood Avenue, LLC, erroneously sued as Evergreen
22 at Heartwood, LLC; Evergreen at Springs Road, LLC; Evergreen at
23

24

25 at Heartwood, LLC; Evergreen at Springs Road, LLC; Evergreen at

1 Tracy, LLC; Evergreen at Oroville, LLC; Evergreen at Petaluma, LLC;
2 and Evergreen at Gridley (SNF), LLC (collectively, Evergreen
3 Entities) move to dismiss the claims Plaintiff brought against
4 them.¹ Defendant Evergreen at Lakeport, LLC (hereinafter,
5 Evergreen Lakeport), on other grounds, moves to dismiss Plaintiff's
6 complaint. The EmpRes Entities and Evergreen Entities join
7 Evergreen Lakeport's motion. The motions were heard on April 7,
8 2011. On April 26, 2011, Defendants moved for leave to file a
9 notice regarding the Ninth Circuit's April 25, 2011 decision in
10 Reudy v. Clear Channel Outdoor, Inc., a case cited by Evergreen
11 Lakeport in connection with its motion to dismiss. Having
12 considered oral argument and the papers submitted by the parties,
13 the Court GRANTS Defendants' motion for leave and the EmpRes and
14 Evergreen Entities' motion to dismiss, and GRANTS in part Evergreen
15 Lakeport's motion to dismiss and DENIES it in part.

16 BACKGROUND

17 I. Factual Allegations and Procedural History

18 Plaintiff is a California resident. EmpRes Healthcare, Inc.,
19 is a Washington corporation with a principal place of business in
20 Washington. EHC Management, LLC; EHC Financial Services, LLC; and
21 Evergreen California Healthcare, LLC, are Washington limited

22 ¹ The EmpRes Entities also filed a Rule 12(b)(2) motion to
23 dismiss for lack of personal jurisdiction, which was to be heard on
24 April 7, 2011. (Docket No. 22.) However, pursuant to stipulation,
25 the hearing on that motion was continued to July 14, 2011. (Docket
26 No. 38.) The Court DENIES without prejudice the EmpRes Entities'
27 Rule 12(b)(2) motion to dismiss. (Docket No. 22.) As explained
below, Plaintiff's claims against the EmpRes Entities are dismissed
with leave to amend. If Plaintiff brings claims against the EmpRes
Entities in an amended pleading, the EmpRes Entities may renew
their Rule 12(b)(2) motion, if appropriate.

1 liability companies that have EmpRes Healthcare as their sole
2 member. Evergreen Lakeport and the Evergreen Entities are
3 Washington limited liability companies that have Evergreen
4 California Healthcare, LLC, as their sole member. The following
5 allegations are contained in Plaintiff's complaint.

Plaintiff resides at Evergreen Lakeport Healthcare (Lakeport Facility), an SNF run by Evergreen Lakeport. She is a "dependent adult," as defined by California Welfare and Institutions Code section 15610.23, and a "disabled person," as defined by California Civil Code section 1761(g).²

11 Evergreen Lakeport did not maintain statutorily-mandated
12 nursing staff levels at the Lakeport Facility. As a result,
13 Plaintiff suffered several "indignities and other harms," including
14 a lack of or delayed responses to her call light and a lack of
15 assistance with grooming, bathing and eating. Compl. ¶ 44. When
16 Plaintiff was admitted to the Lakeport Facility, Evergreen Lakeport
17 did not disclose that it did not comply with staffing requirements.
18 Plaintiff lost money because of this non-disclosure.

19 The EmpRes Entities own and operate Evergreen Lakeport and the

² Welfare and Institutions Code section 15610.23(a) provides:

22 "Dependent adult" means any person between the ages of 18
23 and 64 years who resides in this state and who has
24 physical or mental limitations that restrict his or her
25 ability to carry out normal activities or to protect his
 or her rights, including, but not limited to, persons who
 have physical or developmental disabilities, or whose
 physical or mental abilities have diminished because of
 age.

26 Civil Code section 1761(g) provides, "'Disabled person' means any
27 person who has a physical or mental impairment that substantially
limits one or more major life activities."

1 Evergreen Entities, and "make or approve key decisions" and
2 "procure labor, services and/or merchandise" for them. Compl.
3 ¶ 23. All of the Defendants have overlapping officers, directors
4 and employees, and "operate as a joint venture, single enterprise,
5 are agents of one another, are alter egos, and/or conspire to
6 increase profits by ignoring California's minimum staffing
7 requirements." Id. ¶ 25. Further, Evergreen Lakeport and the
8 Evergreen Entities communicated with the state department of health
9 services for the benefit of the EmpRes Entities.

10 Plaintiff brings three claims against Defendants:
11 (1) violation of California Health and Safety Code § 1430(b);
12 (2) violation of California's Unfair Competition Law (UCL), Cal.
13 Bus. & Prof. Code §§ 17200, et seq.; and (3) violation of the
14 California Consumers Legal Remedies Act (CLRA), Cal. Civ. Code
15 §§ 1750, et seq. She intends to bring these claims on behalf of a
16 class comprised of residents of all SNFs operated by Evergreen
17 Lakeport and the Evergreen Entities.

18 Plaintiff filed her lawsuit in Sonoma County Superior Court.
19 It was subsequently removed based on the Class Action Fairness Act
20 of 2005.

21 II. Statutory and Regulatory Background

22 Plaintiff's action rests in large part on California Health
23 and Safety Code section 1265.5(a), which provides that, subject to
24 an exception that evidently does not apply here, "the minimum
25 number of actual nursing hours per patient required in a skilled
26 nursing facility shall be 3.2 hours." Nursing hours, as used in
27 section 1276.5(a), is defined to mean "the number of hours of work

1 performed per patient day by aides, nursing assistants, or
2 orderlies plus two times the number of hours worked per patient day
3 by registered nurses and licensed vocational nurses (except
4 directors of nursing in facilities of 60 or larger capacity)."
5 Cal. Health & Saf. Code § 1276.5(b)(1).

6 In October 2010, legislation was enacted that amended the
7 California Welfare and Institutions Code by adding section
8 14126.022. See generally S.B. 853, 2010 Cal. Stat. Ch. 717, at 5.
9 Section 14126.022 requires the California Department of Public
10 Health (CDPH) to impose, beginning in the 2010-2011 fiscal year,
11 administrative penalties on skilled nursing facilities that fail
12 "to meet the nursing hours per patient per day requirements
13 pursuant to Section 1276.5 of the Health and Safety Code." Cal.
14 Welf. & Inst. Code § 14126.022(f)(2)(A).

15 On January 31, 2011, CDPH provided skilled nursing facilities
16 with the guidelines it will use "during state audits for compliance
17 with the 3.2 nursing hour per patient day (NHPPD) staffing
18 requirements." Evergreen Lakeport's Request for Judicial Notice
19 (RJN), Ex. 5, at 2.³ In the guidelines, CDPH noted that the 3.2
20 NHPPD staffing requirement "does not assure that any given patient
21 receives 3.2 hours of nursing care; it is the total number of
22 nursing hours performed by direct caregivers per patient day

23
24 ³ Evergreen Lakeport asks the Court to take judicial notice of
25 letters sent by CDPH pursuant to its authority under California
26 Welfare and Institutions Code section 14126.022. Because Plaintiff
27 does not oppose the request and because the fact that CDPH sent the
letters is "capable of accurate and ready determination by resort
to sources whose accuracy cannot reasonably be questioned," the
Court GRANTS Evergreen Lakeport's request. Fed. R. Evid. 201.

1 divided by the average patient census." Id.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended

1 complaint cannot allege facts inconsistent with the challenged
2 pleading. Id. at 296-97.

3 DISCUSSION

4 I. EmpRes and Evergreen Entities' Rule 12(b)(6) Motion to Dismiss

5 A. Claims under California Health and Safety Code Section
6 1430(b)

7 Plaintiff brings claims against the EmpRes and Evergreen
8 Entities under California Health and Safety Code section 1430(b),
9 which provides,

10 A current or former resident or patient of a skilled
11 nursing facility . . . may bring a civil action against
12 the licensee of a facility who violates any rights of the
13 resident or patient as set forth in the Patients Bill of
14 Rights in Section 72527 of Title 22 of the California
Code of Regulations, or any other right provided for by
federal or state law or regulation. . . . The licensee
shall be liable for up to five hundred dollars (\$500),
and for costs and attorney fees, and may be enjoined from
permitting the violation to continue.

15 The EmpRes Entities argue that Plaintiff's section 1430(b)
16 claims against them must be dismissed because they are not
17 licensees of skilled nursing facilities. The Evergreen Entities
18 contend that Plaintiff cannot bring section 1430(b) claims against
19 them because she is not a current or former resident of their
20 facilities. Plaintiff does not dispute that the EmpRes Entities
21 are not licensees of SNFs. Nor does she claim that she is a
22 current or former resident of any of the Evergreen Entities' SNFs.
23 Instead, she argues that she may assert claims against Defendants
24 because Evergreen Lakeport and the EmpRes and Evergreen Entities
25 are agents for and alter egos of each other. Her theory is that
26 Defendants are a single entity that is a licensee for multiple
27 SNFs, including the one in which she resides, and are thus jointly

1 responsible for her alleged injuries.

2 Plaintiff does not plead sufficient facts to support her
3 theory. First, Plaintiff offers no factual basis for her assertion
4 that Evergreen Lakeport, the licensee of the SNF in which she
5 resides, is the agent for the EmpRes or Evergreen Entities.
6 Plaintiff argues that her mere allegation of agency is sufficient
7 to meet her pleading burden. This is incorrect. The Court need
8 not accept as true "a legal conclusion couched as a factual
9 allegation." Iqbal, 129 S. Ct. at 1950 (citation and internal
10 quotation marks omitted).

11 Second, Plaintiff's allegations do not support invocation of
12 the alter ego doctrine. To avail herself of the doctrine,⁴
13 Plaintiff must allege two elements: "First, there must be such a
14 unity of interest and ownership between the corporation and its
15 equitable owner that the separate personalities of the corporation
16 and the shareholder do not in reality exist. Second, there must be
17 an inequitable result if the acts in question are treated as those
18 of the corporation alone." Sonora Diamond Corp. v. Superior Court,
19 83 Cal. App. 4th 523, 526 (2000). Factors that the court may
20 consider include "the commingling of funds and assets of the two
21 entities, identical equitable ownership in the two entities, use of
22 the same offices and employees, disregard of corporate formalities,
23 identical directors and officers, and use of one as a mere shell or

24 _____
25 ⁴ As noted above, Defendants are organized under Washington
26 law. However, they did not take the position that Washington law
27 controls in this case. For the purposes of this motion, the Court
assumes that California's alter ego doctrine, which is more lenient
than Washington's, applies.

1 conduit for the affairs of the other." Troyk v. Farmers Group, Inc., 171 Cal. App. 4th 1305, 1342 (2009). The alter ego doctrine
2 may apply between a parent and a subsidiary or, "under the single
3 enterprise rule, . . . between sister or affiliated companies."
4 Id. at 1341 (citation and internal quotation and editing marks
5 omitted). As to the first prong, Plaintiff provides general
6 allegations that the EmpRes Entities make decisions for Evergreen
7 Lakeport and the Evergreen Entities, that Evergreen Lakeport and
8 the Evergreen Entities "use . . . the [EmpRes] Entities to procure
9 labor, services and/or merchandise" for the SNFs and that
10 Defendants share officers, directors and employees. Compl. ¶ 23.
11 These broad allegations are not sufficient to show a unity of
12 interest and ownership. Even if they were, Plaintiff does not
13 satisfy the second prong; she fails to allege facts to suggest that
14 an inequitable result will occur if the EmpRes and Evergreen
15 Entities are not held liable for her injuries.

16 Plaintiff argues that, even if she does not have individual
17 claims against the EmpRes or Evergreen Entities, she nevertheless
18 should be able to assert claims against them for injuries they may
19 have caused putative class members. She invokes the "juridical
20 link" doctrine and this Court's decision in Cady v. Anthem Blue
21 Cross Life and Health Insurance Company, 583 F. Supp. 2d 1102 (N.D.
22 Cal. 2008). However, as Cady states, that doctrine pertains to the
23 analyses of adequacy and typicality, as required by Federal Rule of
24 Civil Procedure 23; it does not "apply to standing questions at the
25 pleading stage." Siemers v. Wells Fargo & Co., 2006 WL 3041090, at
26 *5-*8 (N.D. Cal.) (citing Forsythe v. Sun Life Fin., Inc., 417 F.

1 Supp. 2d 100, 119 n.19 (D. Mass. 2006); Henry v. Circus Circus
2 Casinos, Inc., 223 F.R.D. 541, 544 (D. Nev. 2004)). Absent
3 allegations that she suffered injury fairly traceable to the EmpRes
4 or Evergreen Entities' conduct, Plaintiff lacks standing to bring
5 claims against them. See Chandler v. State Farm Mut. Auto. Ins.
6 Co., 598 F.3d 1115, 1122 (9th Cir. 2010) (discussing requirements
7 for Article III standing) (citing Lujan v. Defenders of Wildlife,
8 504 U.S. 555, 560-61 (1992)). As explained above, Plaintiff does
9 not plead a sufficient factual basis for her assertion that her
10 injuries were the result of any act by the EmpRes or Evergreen
11 Entities.

12 Accordingly, the Court grants the EmpRes and Evergreen
13 Entities' motion to dismiss Plaintiff's section 1430(b) claims.
14 Plaintiff's section 1430(b) claims against the EmpRes Entities are
15 dismissed with leave to amend to plead facts showing that they are
16 alter egos of Evergreen Lakeport. Her claims against the Evergreen
17 Entities are dismissed without leave to amend.

18 B. UCL Claims

19 California's Unfair Competition Law (UCL) prohibits any
20 "unlawful, unfair or fraudulent business act or practice." Cal.
21 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
22 treats violations of those laws as unlawful business practices
23 independently actionable under state law. Chabner v. United Omaha
24 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of
25 almost any federal, state or local law may serve as the basis for a
26 UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832,
27 838-39 (1994). In addition, a business practice may be "unfair or

1 fraudulent in violation of the UCL even if the practice does not
2 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,
3 827 (2003). To have standing to bring a UCL claim, plaintiffs must
4 show that they "suffered an injury in fact" and "lost money or
5 property as a result of the unfair competition." Cal. Bus. & Prof.
6 Code § 17204. The purpose of section 17204 is to "eliminate
7 standing for those who have not engaged in any business dealings
8 with would-be defendants." Kwikset Corp. v. Superior Court, 51
9 Cal. 4th 310, 317 (2011).

10 Plaintiff's UCL claims fail for the reasons stated above. She
11 has not alleged that the EmpRes or Evergreen Entities caused her an
12 injury in fact. Her allegations do not suggest that she had any
13 business dealings with these Defendants. People v. Witzerman, 29
14 Cal. App. 3d 169 (1972), and People v. Bestline Products, Inc., 61
15 Cal. App. 3d 879 (1976), are distinguishable and do not warrant a
16 different conclusion. These cases were brought by the California
17 attorney general, who is not constrained by the standing
18 requirement contained in section 17204.

19 Accordingly, the Court grants the EmpRes and Evergreen
20 Entities' motion to dismiss Plaintiff's UCL claims. Plaintiff's
21 UCL claims against the EmpRes Entities are dismissed with leave to
22 amend to plead facts showing that they are alter egos of Evergreen
23 Lakeport. Her UCL claims against the Evergreen Entities are
24 dismissed without leave to amend.

25 C. CLRA Claims

26 "The CLRA makes unlawful certain 'unfair methods of
27 competition and unfair or deceptive acts or practices' used in the

1 sale of goods or services to a consumer." Wilens v. TD Waterhouse
2 Group, Inc., 120 Cal. App. 4th 746, 753 (2003) (quoting Cal. Civ.
3 Code § 1770(a)). Like the UCL, the CLRA has a provision requiring
4 plaintiffs to have standing to bring claims under the law. Section
5 1780(a) provides, "Any consumer who suffers any damage as a result
6 of the use or employment by any person of a method, act, or
7 practice declared to be unlawful by Section 1770 may bring an
8 action" under the CLRA. Thus, to pursue a CLRA claim, plaintiffs
9 must have been "exposed to an unlawful practice" and "some kind of
10 damage must result." Meyer v. Sprint Spectrum L.P., 45 Cal. 4th
11 634, 641 (2009).

12 Plaintiff has not alleged that the EmpRes or Evergreen
13 Entities deceived her in the sale of services to her and that she
14 suffered damages as a result. Accordingly, the Court grants the
15 EmpRes and Evergreen Entities' motion to dismiss Plaintiff's CLRA
16 claims. Plaintiff's CLRA claims against the EmpRes Entities are
17 dismissed with leave to amend to plead facts showing that they are
18 alter egos of Evergreen Lakeport. Her CLRA claims against the
19 Evergreen Entities are dismissed without leave to amend.

20 II. Evergreen Lakeport's Motion to Dismiss

21 Evergreen Lakeport argues that Plaintiff's case should not be
22 adjudicated, in part or in whole. First, Evergreen Lakeport
23 asserts that the Court should abstain from hearing all of
24 Plaintiff's claims or, in the alternative, stay her case pursuant
25 to California's primary jurisdiction doctrine. If Plaintiff's case
26 is heard, Evergreen Lakeport asserts that her claims under section
27 California Health and Safety Code section 1430(b) and the CLRA must

1 be dismissed.

2 A. California's Equitable Abstention Doctrine

3 Evergreen Lakeport argues that California's equitable
4 abstention doctrine requires the Court to abstain from hearing
5 Plaintiff's case.

6 The judicially-created equitable abstention doctrine gives
7 courts discretion to abstain from deciding a UCL claim. Desert
8 Healthcare Dist. v. PacifiCare FHP, Inc., 94 Cal. App. 4th 781, 795
9 (2001); see also Alvarado v. Selma Convalescent Hosp., 153 Cal. App.
10 4th 1292, 1297-98 (2007). Courts have such discretion "because the
11 remedies available under the UCL, namely injunctions and
12 restitution, are equitable in nature." Desert Healthcare, 94 Cal.
13 App. 4th at 795. Abstention under the doctrine may be appropriate
14 if: (1) resolving the claim requires "determining complex economic
15 policy, which is best handled by the legislature or an
16 administrative agency;" (2) "granting injunctive relief would be
17 unnecessarily burdensome for the trial court to monitor and enforce
18 given the availability of more effective means of redress;" or
19 (3) "federal enforcement of the subject law would be more orderly,
20 more effectual, less burdensome to the affected interests."
21 Alvarado, 153 Cal. App. 4th at 1298 (citations and internal
22 quotation marks omitted).

23 In Alvarado, the state appellate court concluded that, for two
24 reasons, the trial court did not abuse its discretion when it

1 abstained from hearing the plaintiff's UCL claims,⁵ which were
2 based on numerous skilled nursing facilities' alleged failures to
3 satisfy section 1276.5(a)'s staffing requirements. First, the
4 appellate court held that adjudicating Alvarado's UCL claims "would
5 require the trial court to assume general regulatory powers over
6 the health care industry through the guise of enforcing the UCL, a
7 task for which the courts are not well-equipped." 153 Cal. App.
8 4th at 1304 (citation omitted). The language and statutory context
9 of section 1276.5(a), according to Alvarado, demonstrate that it
10 "is a regulatory statute, which the Legislature intended the
11 [Department of Health Services] to enforce."⁶ Id. at 1304. The
12 appellate court reasoned that determining compliance with the
13 staffing requirement, in a class action, would require a trial
14 court to make several determinations "better accomplished by an
15 administrative agency." Id. at 1306. For instance, the trial
16 court would need to "determine on a class-wide basis whether a
17 particular skilled nursing or intermediate care facility is
18 governed by section 1276.5 or 1276.9." Id. at 1305. Then, the
19 trial court would be required to "calculate nursing hours for each
20 facility involved in this case," which would entail classifying the
21

22 ⁵ Alvarado brought three claims: "(1) unlawful business
23 practice in violation of Business and Professions Code section
24 17200; (2) unfair and fraudulent business practice in violation of
Business and Professions Code section 17200; and, (3) false
advertising in violation of Business and Professions Code [section]
17500." Alvarado, 153 Cal. App. 4th at 1296.

25 ⁶ Under the California Public Health Act of 2006, which took
26 effect in July 2007, some of the responsibilities of the former
Department of Health Services (DHS) were transferred to the newly-
established CDPH. See generally S.B. 162 § 1, 2006 Cal. Legis.
27 Serv. Ch. 241.

1 employees of that facility. Id. In addition, because section
2 1276.5(b) provides a different formula for skilled nursing
3 facilities with a capacity of sixty or more residents, "the court
4 would have to determine on a class-wide basis the size,
5 configuration and licensing status of skilled nursing and
6 intermediate care facilities." Id. at 1306.

7 The second reason supporting abstention was the manageability
8 of injunctive relief. The Alvarado court concluded that, if the
9 trial court found various SNFs in violation of section 1276.5(a),
10 "it would have to decide whether to issue networks of injunctions
11 across the State of California" and then "monitor and enforce
12 them." 153 Cal. App. 4th at 1306. According to Alvarado,
13 administering such relief would be "unnecessarily burdensome" for a
14 trial court. Id. The court noted that the plaintiff could have
15 petitioned for a writ of mandamus, compelling the administrative
16 agency to enforce section 1276.5(a)'s staffing requirement. Id. at
17 1306 n.5. Because an administrative agency was better suited to
18 enforce of section 1276.5(a) on a class-wide basis and because
19 granting injunctive relief would be unnecessarily burdensome, the
20 Alvarado court concluded that the trial court acted within its
21 discretion to abstain.

22 Contrary to Evergreen Lakeport's argument, Alvarado does not
23 mandate abstention.⁷ The court made clear that the issue before it
24

25 ⁷ Reudy v. Clear Channel Outdoor, Inc., 2011 WL 1542978 (9th
26 Cir.), also does not require abstention. Reudy, which is not
27 precedential, merely reiterates that a court "may abstain from
employing the relief permitted by the UCL" under certain
circumstances. Id. at *1.

1 was whether "the trial court abused its discretion by abstaining
2 from adjudicating the alleged controversy," not whether it would be
3 an abuse of discretion not to abstain. Alvarado, 153 Cal. App. 4th
4 at 1297. Indeed, Alvarado leaves open the possibility that
5 district attorneys can bring claims against SNFs for alleged
6 violations of section 1276.5(a), *id.* at 1297 n.3, which suggests
7 that abstention is not mandatory. Such actions would raise the
8 same concerns of manageability posed by Alvarado's suit.

9 Here, abstention is not currently warranted. The analyses
10 required to adjudicate Plaintiff's UCL claim against Evergreen
11 Lakeport have not been shown to be overly complex, nor is there any
12 indication that enforcing injunctive relief against Evergreen
13 Lakeport would be unduly burdensome.

14 Even if abstention were appropriate as to Plaintiff's UCL
15 claims, the equitable abstention doctrine does not afford the Court
16 discretion to abstain from hearing Plaintiff's claims for damages
17 under section 1430(b) or the CLRA, which are legal remedies. As
18 noted above, courts have discretion to abstain from UCL claims
19 because of its equitable remedies. Evergreen Lakeport offers no
20 authority granting the Court discretion to decline jurisdiction
21 with respect to Plaintiff's section 1430(b) and CLRA claims.

22 Accordingly, Evergreen Lakeport's motion to dismiss
23 Plaintiff's action based on California's equitable abstention
24 doctrine is denied without prejudice to renewal if the
25 circumstances change.

26 B. Primary Jurisdiction Doctrine

27 Under the primary jurisdiction doctrine, federal and state

1 courts may exercise discretion to stay an action pending "referral"
2 of the issues to an administrative body.⁸ Chabner, 225 F.3d at
3 1051; Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 386-390
4 (1992). The doctrine applies "when a claim is originally
5 cognizable in the courts, but is also subject to a regulatory
6 scheme that is enforced by an administrative body of special
7 competence." Chabner, 225 F.3d at 1051. "In federal and
8 California state courts, 'no rigid formula exists for applying the
9 primary jurisdiction doctrine.'" Id. (quoting Farmers Ins., 2 Cal.
10 4th at 391) (editing marks omitted). A court may consider
11 "1) whether application will enhance court decision-making and
12 efficiency by allowing the court to take advantage of
13 administrative expertise; and 2) whether application will help
14 assure uniform application of regulatory laws." Chabner, 225 F.3d
15 at 1051.

16 Evergreen Lakeport does not establish that a stay under the
17 primary jurisdiction doctrine is necessary. The matters raised by
18 Plaintiff's claims do not pose any novel issues or suggest a need
19 for the CDPH's expertise. Furthermore, adjudication of Plaintiff's
20 case would not threaten the uniform application of California's
21 regulatory laws. A judicial determination as to whether Evergreen
22 Lakeport satisfies its obligation under section 1276.5(a)'s
23 staffing requirement does not appear to implicate technical or

24
25 ⁸ Although courts use the word "referral" to explain the
primary jurisdiction doctrine, this word "is perhaps not the most
accurate term to describe this process, as most statutes do not
authorize courts to require an agency to issue a ruling." Clark v.
Time Warner Cable, 523 F.3d 1110, 1115 n.9 (9th Cir. 2008) (citing
Reiter v. Cooper, 507 U.S. 258, 268 n.3 (1993)).

1 policy determinations usually reserved to an administrative agency.
2 Clark, 523 F.3d at 1114. Finally, there is no evidence that the
3 CDPH is currently considering whether Evergreen Lakeport meets
4 nurse staffing requirements, or that it will do so in the future.

5 Accordingly, Evergreen Lakeport's motion to dismiss under the
6 primary jurisdiction doctrine is denied.

7 C. Claim Under California Health and Safety Code Section
8 1430(b)

9 As stated above, section 1430(b) gives current or former
10 residents of an SNF a right to sue the licensee of that SNF for
11 violations of "any rights of the resident or patient as set forth
12 in the Patients Bill of Rights in Section 72527 of Title 22 of the
13 California Code of Regulations, or any other right provided for by
14 federal or state law or regulation."

15 Evergreen Lakeport argues that Plaintiff's section 1430(b)
16 claim against it, to the extent it is based on allegations that
17 Evergreen Lakeport violated section 1276.5(a)'s minimum staffing
18 requirement, should be dismissed. According to Evergreen Lakeport,
19 the minimum staffing requirement does not provide a right of action
20 under state law and, as a result, cannot give rise to a claim under
21 section 1430(b).

22 The parties cite no California authority addressing directly
23 which state laws or regulations create rights enforceable under
24 section 1430(b). Lu v. Hawaiian Gardens, 50 Cal. 4th 592 (2010),
25 and Moradi-Shalal v. Fireman's Fund Insurance Companies, 46 Cal. 3d
26 287 (1988), are not entirely on point. Both cases address whether
27 certain state statutes give rise to private causes of action. See

1 Lu, 50 Cal. 4th at 596; Moradi-Shalal, 46 Cal. 3d at 305. Here,
2 Plaintiff asserts a cause of action under section 1430(b) to
3 enforce a right she claims to exist under section 1276.5(a); she
4 does not bring a cause of action under section 1276.5(a). Federal
5 cases interpreting claims under 42 U.S.C. § 1983 are instructive on
6 this point.⁹ Like section 1430(b), section 1983 "merely provides a
7 mechanism for enforcing individual rights 'secured' elsewhere."
8 Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002). Section 1983 "'by
9 itself does not protect anyone against anything.'" Id. (quoting
10 Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979)).

11 "A court's role in discerning whether personal rights exist in
12 the § 1983 context should . . . not differ from its role in
13 discerning whether personal rights exist in the implied right of
14 action context." Gonzaga, 536 U.S. at 285. The inquiries into
15 "whether a private right of action can be implied from a particular
16 statute" and whether a federal statute confers an right enforceable
17 under § 1983 share the common question of whether the legislature
18 "intended to confer individual rights upon a class of
19 beneficiaries." Id. Such intent could be gleaned from the text
20 and structure of the statute and the legislative history. Id.; see also Lu, 50 Cal. 4th at 596 (discussing analysis of whether state
21 statute contains private right of action).

22 Plaintiff does not argue that section 1276.5(a) contains

23
24
25 ⁹ Plaintiff argues that § 1983 cases are inapposite because
26 they address concerns over federalism. Although determining
27 whether Congress intended to confer a federal right may require an
analysis of the impact on the states, these cases' teachings that
legislative intent must be considered do not rely on federalism
concerns.

1 explicit language conferring rights on SNF residents. Instead, she
2 asserts that the "any other right" language contained in section
3 1430(b) is directed at any statute or regulation that pertains to
4 "patient care standards or resident welfare issues," and that
5 section 1276.5(a) is such a statute. Opp'n to Evergreen Lakeport's
6 Mot. to Dismiss 10:12. She cites the Patients Bill of Rights,
7 which states that residents of SNFs have rights "as specified in
8 Health and Safety Code, Section 1599.1." Cal. Code Regs., tit. 22,
9 § 72527(24). That statute provides several rights that are couched
10 as obligations of an SNF, such as, "The facility shall employ an
11 adequate number of qualified personnel to carry out all of the
12 functions of the facility." Cal. Health & Safety Code § 1599.1(a).
13 Plaintiff also cites a legislative committee report on AB 2791, the
14 2004 assembly bill that amended section 1430(b) by, among other
15 things, adding the "any other right" language to the statute. See
16 generally Pl.'s RJD, Ex. C.¹⁰ The report, however, does not discuss
17 the inclusion of this language. It addresses only a proposal to
18 raise the statutory penalty for violations of section 1430(b) from
19 \$500 to \$5,000, in order to provide further financial incentives
20 for residents to enforce their rights through civil actions.¹¹ This

21 ¹⁰ Plaintiff asks the Court to take judicial notice of a
22 summary by the California Assembly Committee on Health of AB 2791,
23 which amended California Health and Safety Code section 1470(b).
24 Because Defendants do not oppose the request and the fact that the
25 committee issued the report is "capable of accurate and ready
determination by resort to sources whose accuracy cannot reasonably
be questioned," the Court GRANTS Plaintiff's request. Fed. R.
Evid. 201.

26 ¹¹ In relevant part, the report states,

27 According to the author, this bill is necessary because,

1 proposal was never adopted.

2 The Patients Bill of Rights and the legislative history of the
3 2004 amendments indicate that section 1276.5(a) may be enforced
4 through a civil action under section 1430(b). As noted above, a
5 resident of an SNF has a right to the facility employing "an
6 adequate number of qualified personnel" to perform the facility's
7 functions. Cal. Health & Safety Code § 1599.1(a). Section
8 1276.5(a) provides an objective measure of what constitutes
9 "adequate." Further, the 2004 amendments were intended to expand
10 private enforcement of residents' rights based on the bill author's
11 concern that enforcement by CDPH would be constrained by financial
12 and demographic pressures in the coming years. See Pl.'s RJD, Ex.
13 C, at AP12. Thus, that the CDPH may enforce section 1276.5(a) does
14 not preclude residents from doing so.

15 Evergreen Lakeport argues that section 1276.5(a) does not
16 confer an individual right because it does not have an individual
17

18 despite numerous deficiencies reported by the Department
19 of Health Services every year and thousands of unresolved
20 complaints received by the Ombudsman, SNF residents have
21 not exercised their private right of action under current
22 law which limits a nursing home's liability to \$500. The
23 author states that current law intended to provide a
24 specific mechanism for an individual resident to enforce
25 his or her rights through a private right of
26 action. . . . The author notes that the State is facing
severe health care cost pressures that are likely to
continue and that the number of seniors in California is
expected to double in the next 15 years. With such cost
and demographic pressures, the author believes that state
functions such as licensing and certification of health
facilities may suffer, and it thus becomes more important
than ever to ensure that residents' rights be respected
and enforced.

27 Pl.'s RJD, Ex. C, at AP11-12.

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1 focus. This argument, however, is undermined by section 1599.1,
2 which confers rights on residents but is phrased, in part, as
3 obligations imposed on SNFs. Evergreen Lakeport also argues that,
4 because section 1276.5(a) is regulatory in nature, it cannot confer
5 an enforceable right. This is incorrect. Determining whether a
6 so-called "regulatory statute" confers rights depends on the intent
7 underlying the law. Goehring v. Chapman Univ., 121 Cal. App. 4th
8 353, 375 (2004) ("The question of whether a regulatory statute
9 creates a private right of action depends on legislative intent.").

10 Accordingly, Evergreen Lakeport's motion to dismiss
11 Plaintiff's section 1430(b) claim is denied.

12 D. CLRA Claim

13 As noted above, the CLRA prohibits "deceptive acts or
14 practices undertaken by any person in a transaction intended to
15 result or which results in the sale or lease of goods or services
16 to any consumer." Cal. Civ. Code § 1770(a). Evergreen Lakeport
17 contends that Plaintiff's CLRA claim fails a matter of law because
18 the CLRA does not encompass services provided by an SNF. However,
19 the CLRA defines "services" to mean "work, labor, and services for
20 other than a commercial or business use, including services
21 furnished in connection with the sale or repair of goods." Id.
22 § 1761(b). Health services, provided by SNFs, fall within this
23 definition. The cases cited by Evergreen Lakeport, which concern
24 life insurance coverage, mortgages, credit cards, computer
25 software, securities, and services related to real estate
26 transactions do not warrant a contrary conclusion.

27 Plaintiff, however, fails to plead her CLRA claim with
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1 sufficient specificity. Because the claim sounds in fraud, it is
2 subject to the heightened pleading requirements of Federal Rule of
3 Civil Procedure 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120,
4 1125-26 (9th Cir. 2009). "In all averments of fraud or mistake,
5 the circumstances constituting fraud or mistake shall be stated
6 with particularity." Fed. R. Civ. Proc. 9(b). The allegations
7 must be "specific enough to give defendants notice of the
8 particular misconduct which is alleged to constitute the fraud
9 charged so that they can defend against the charge and not just
10 deny that they have done anything wrong." Semege v. Weidner, 780
11 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and
12 nature of the alleged fraudulent activities are sufficient, id. at
13 735, provided the plaintiff sets forth "what is false or misleading
14 about a statement, and why it is false." In re GlenFed, Inc.,
15 Secs. Litiq., 42 F.3d 1541, 1548 (9th Cir. 1994). Scienter may be
16 averred generally, simply by saying that it existed. Id. at 1547;
17 see Fed. R. Civ. Proc. 9(b) ("Malice, intent, knowledge, and other
18 condition of mind of a person may be averred generally.").
19 Allegations of fraud based on information and belief usually do not
20 satisfy the particularity requirements of Rule 9(b); however, as to
21 matters peculiarly within the opposing party's knowledge,
22 allegations based on information and belief may satisfy Rule 9(b)
23 if they also state the facts upon which the belief is founded.
24 Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir.
25 1987).

26 Plaintiff does not identify, with any specificity, the basis
27 of her CLRA claim. She states generally that Evergreen Lakeport,
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1 in "promotional materials, admission agreements, submissions made
2 to DHS and other materials disseminated to the public," represents
3 that its facilities "provide sufficient and lawful staffing."
4 Compl. ¶ 75; see also id. ¶¶ 37-38. She does not allege the
5 circumstances in which she viewed these materials or what was false
6 about them. Accordingly, Plaintiff's CLRA claim must be dismissed
7 for failure to plead in accordance with Rule 9(b).

8 CONCLUSION

9 For the foregoing reasons, the Court GRANTS Defendants' motion
10 for leave to file the additional authority of Reudy v. Clear
11 Channel Outdoor, Inc. (Docket No. 46), DENIES without prejudice the
12 EmpRes Entities' Rule 12(b)(2) motion to dismiss (Docket No. 22),
13 GRANTS the EmpRes and Evergreen Entities' Rule 12(b)(6) motion to
14 dismiss (Docket No. 25) and GRANTS in part Evergreen Lakeport's
15 motion to dismiss and DENIES it in part (Docket No. 23).
16 Plaintiff's claims against the EmpRes Entities are dismissed with
17 leave to amend to plead facts showing that they are alter egos of
18 Evergreen Lakeport. Her claims against the Evergreen Entities are
19 dismissed without leave to amend. Plaintiff's CLRA claim against
20 Evergreen Lakeport is dismissed with leave to amend to allege facts
21 as required by Rule 9(b). In all other respects, Evergreen
22 Lakeport's motion is denied.

23 If Plaintiff intends to file an amended complaint, she shall
24 do so within fourteen days from the date of this Order. If an
25 amended complaint is filed, the EmpRes Entities and Evergreen
26 Lakeport shall answer or move to dismiss it fourteen days after it
27 is filed. Plaintiff shall file her opposition to any motion to

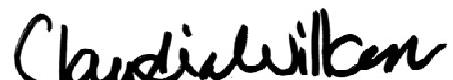
1 dismiss fourteen days after it is filed. Any reply, if necessary,
2 shall be due seven days after Plaintiff files her opposition. Any
3 motion to dismiss will be decided on the papers. With respect to
4 Evergreen Lakeport, leave to amend is limited to Plaintiff's CLRA
5 claim. Accordingly, Evergreen Lakeport's motion to dismiss, if it
6 chooses to file one, may concern only Plaintiff's CLRA claim.

7 Plaintiff's section 1430(b) and UCL claims against Evergreen
8 Lakeport are cognizable. The Court extends the time Evergreen
9 Lakeport has to answer these claims. Evergreen Lakeport's answer
10 shall be due fourteen days after the Court enters an order on any
11 motion to dismiss a first amended complaint. If Plaintiff does not
12 file an amended pleading, Evergreen Lakeport's answer shall be due
13 twenty-eight days from the date of this Order.

14 The case management conference, currently set for July 14,
15 2011, is continued to July 26, 2011 at 2:00 p.m.

16 IT IS SO ORDERED.

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18 Dated: 5/25/2011
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CLAUDIA WILKEN
United States District Judge